

No doubt, Ajaib Singh J. allowed himself to be influenced by *Lee Wai Kam v. Public Prosecutor*⁽²⁾ where Abdoolcader J. held that "there was no reason why section 34 of the Penal Code should not apply to section 392 read together with section 397 of the Penal Code to the same extent as it applies to other offences ... as the matter has been conclusively determined by the Court of Criminal Appeal of Singapore in *Rex v. Yeo Kim Watt*."⁽³⁾ That judgment received adverse editorial comment at pp. lxxxvii to lxxxix of the same volume ([1946] M.L.J.). We do not agree with that judgment for the reasons given by the learned editor. In that case and *Lee Wai Kam*, the error was in the view taken that section 397 read with section 392 creates a separate and distinct offence. We would adopt the comments of the learned editor which we now reproduce *seriatim*:—

"The point at issue is however whether section 397 constitutes a separate offence in itself. We respectfully submit that it does not and that in fact section 397 only provides for an additional punishment for the person or persons who at the time of committing or attempting to commit robbery are armed with or use deadly weapons or cause grievous hurt or attempts to cause death or grievous hurt" and concluded:—

"We feel that the Court of Criminal Appeal should have set a higher value to the present unanimous opinion of the courts in India that section 34 of the Indian Penal Code has no application to section 397 or 398 of that Code."

(Our section 397 replaced the former sections *in pari materia* which provided for minimum terms to be imposed and prescribed that the punishment for robbery (under section 392) and attempted robbery (under section 393) for an offender armed with a deadly weapon shall be liability to whipping "in addition to any other punishment under any other section of the Code.").

As *Ratanlal* in *The Law of Crimes* (22nd Edition) at page 1024 says:—

"This section is merely a rider to section 394. It does not create any substantive offence."

We, therefore, allow the appeal of the appellant and set aside his conviction and sentence on the first charge. The co-accused was sentenced concurrently with his sentence on the second charge and no order need be made here in regard to his conviction and sentence on the first charge.

Upon the record we are satisfied that there was ample evidence on the charges against the appellant and his co-accused of offences under sections 4 and 9 respectively of the Firearms (Increased Penalties) Act, 1971. They have both pleaded guilty thereto. We therefore dismiss his appeal in respect of the second charge.

The judgment, to the extent as varied, stands.

Order accordingly.

Solicitors: *Pasupathy & Co.*

MOHAMED NOOR BIN AWANG v. MEK TOK BINTI MAT MIN

[F.C. (Suffian L.P., Gill C.J. (Malaya) and Mohamed Zahir J.)
June 6 and July 6, 1977]

[Kota Bharu — Federal Court Civil Appeal No. 158 of 1976]

Land Law — Jual Janji — Land redeemed by third person on agreement to transfer land when redeemed by original owner — Whether trust created in favour of original owner.

The plaintiff, the owner of certain land entered into a *jual janji* agreement with one Daud under which it was agreed that he could redeem it by the 5th March 1959. Before that date he agreed with the respondent that the respondent should redeem the land and hold it and that when the plaintiff wanted to redeem it, the respondent was to transfer the land to him. Subsequently the plaintiff wanted to redeem the land but the respondent refused to allow him to do so. The plaintiff sued the respondent for the return of the land but the learned judge without hearing any evidence dismissed the claim. On appeal by the personal representatives of the plaintiff (who had since died),

Held: (1) the claim in this case was founded not on the *jual janji* transaction with Daud but on another, the transaction between the plaintiff and the respondent, which according to the plaintiff gave rise to a trust in his favour;

(2) whether or not the plaintiff's personal representative could prove the trust was a matter of evidence and the dispute should therefore be allowed to go to trial.

FEDERAL COURT.

Datuk Wan Mustapha for the appellant.

Mahmood Adam for the respondent.

Suffian L.P. (delivering the judgment of the Court, read by Mohamed Zahir J.): We allowed this appeal and now give our reasons.

On March 5, 1956, the plaintiff entered into a *jual janji* transaction with one Daud bin Bulat ("Daud"). The land in question was transferred into Daud's name, it being agreed that the plaintiff could redeem it on March 5, 1959. The plaintiff did not redeem it by that date.

However before that date, the plaintiff had agreed with his nephew's wife, the defendant, that the defendant might redeem it from Daud on the plaintiff's behalf, whereupon she was to hold it on trust by way of mortgage for an unlimited period, and that when the plaintiff wanted to redeem it from the defendant, the defendant was to transfer the land back to the plaintiff. In pursuance of this agreement the defendant after March 5, 1959, redeemed the land from Daud and the defendant became the registered owner. The plaintiff went off to live with his son in Pahang and several years later when he returned to Kelantan, he asked to redeem the land from the defendant; she however refused to allow it. The defendant says that she had bought the land from Daud in good faith.

The plaintiff sues the defendant, claiming a declaration among other things that the land had been transferred by Daud to the defendant as a security and that the mortgage is still subsisting.

The learned judge without hearing any evidence dismissed the plaintiff's claim, on the ground that the plaintiff had no cause of action. Clearly the judge was under the impression that the plaintiff's claim was founded on the transaction between the plaintiff and

Daud, under which (he said and it is true) the plaintiff could redeem the land on but not after March 5, 1959. With respect we think the learned judge was in error. The plaintiff's claim is founded not on that transaction but on *another*, the transaction between the plaintiff and the *defendant* which, according to the plaintiff gives rise to a *trust* in his favour.

Whether or not the plaintiff's personal representative (the plaintiff has since died) can prove this trust is a matter of evidence, and we are of the opinion that in fairness to him this dispute should be allowed to go to trial when the parties can call whatever witnesses are available to prove or disprove the alleged trust.

We ordered that the costs of the appeal should abide the event.

Order accordingly.

Solicitors: *Datuk Wan Mustapha & Co.; Mahmood Adam & Co.*

NG LIT CHENG v. FELIXIA VARNAKULASINGHE & ANOR.

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah FJJ.)
July 7, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 19 of 1976]

Probate and Administration — Sale of land belonging to estate — Order for sale made by Court — Objection by beneficiary — Bona fide purchaser for value — Effect of order by court — Service on beneficiaries.

In this case the High Court had made an order whereby leave was granted to the second respondent, the administrator of the estate of John David deceased to sell the land which was the only property of the estate to the appellant. The majority of the beneficiaries had agreed to the sale but after the order was made an objection was raised by the first appellant, who was entitled to 1/360 share in the estate. After the order had been obtained, an offer of a higher price was made. The learned trial judge set aside his order on the grounds (a) that the applicant had not disclosed a valuation of the land which had been obtained; (b) that the applicant had not disclosed a previous offer to purchase the land and (c) that the applicant had made no real attempts to locate all the beneficiaries. The appellant appealed.

Held: (1) there is no stringent rule of law or procedure that all the beneficiaries must be served, especially if they are descendants of the beneficiaries named in the will and their whereabouts are unknown, when an application is made to convert land into money for the purposes of distribution;

(2) the non-disclosure of the previous offer was neither relevant nor material, as the offer was for a little more than half the price the appellant was prepared to pay and was made not long before the order for sale was applied for;

(3) the non-disclosure of the valuation certificate was not material in view of the fact that the land was agreed to be sold at \$35,000 more than it was valued;

(4) the learned judge erred in failing to hold that the appellant was a *bona fide* purchaser for value without notice of any equity in the land. Upon the approval by the court of the sale agreement the appellant's rights in the land crystallized and thereafter the appellant held the land in trust for him;

(5) there must be a clear distinction between the position of a potential purchaser from the estate of an intestate deceased whose contract can only be conditional until the court approves the sale and the position of a purchaser whose contract has already been confirmed by a court order;

(6) a breach of the rules affecting service of parties does not automatically render void an order made in the proceedings in which it occurs and it is necessary for the court subsequently passing upon it to consider the circumstances and consequences to which it relates;

(7) the offer of a much higher price after the order for sale had been passed and perfected was wholly irrelevant.

Cases referred to:-

(1) *Che Ah and Che Yang Kelsom v. Che Ahmad* [1941] M.L.J. 126.

(2) *Haji Saud v. Haji Ahmad & Anor.* [1957] M.L.J. 50.

(3) *In re Bartlett* (1880-1) 16 Ch. D. 561.

(4) *Ganapathy Chettiar v. Peria Karuppan Chettiar & Anor.* [1962] M.L.J. 207, 211.

FEDERAL COURT.

Stanley Ponniah (S.F. Leow with him) for the appellant.

C. Thambiah for the first respondent.

John Chia for the second respondent.

Gill C.J. (Malaya): This is an appeal from an order made by Ajaib Singh J. on January 8, 1976 setting aside his earlier order of November 25, 1974 whereby leave was granted to Joseph Jacob David alias Jacob Joseph as the Administrator with will annexed of the Estate of John David deceased to sell and transfer to one Ng Lit Cheng alias Ng Yam Chee for the sum of \$110,000 the land comprised in Grant 953 for Lot 368 in the Mukim of Rasah, Seremban which was the only property belonging to the said estate. The said Ng Lit Cheng as the purchaser is the appellant in these proceedings.

The deceased John David died on June 29, 1920, having made a will on April 13, 1920 by which he bequeathed all his property as follows: (a) 5/16 share to his brother Francis Daniel David, (b) 4/16 share to his brother Benjamin David, (c) 3/16 share to his godson Jacob Joseph, (d) 1/32 share to R. Sinnappan brought up in the family (e) 1/16 share to his sister Elizabeth Muttama, (f) 1/16 share to his wife Mary Beatrice Thangkutti Varnakulasinghe and (g) 3/32 share to Miss Rasamma caretaker and housekeeper.

Letters of Administration with will annexed were granted to the Administrator by his attorney Dato Athi Nahappan by the High Court at Seremban on September 22, 1970. On August 5, 1974 the administrator, having earlier discharged his original attorney, appointed one E.P.E. Ananda as his attorney in Malaysia (hereinafter referred to as "the Attorney") by a duly registered power of attorney. On August 26, 1974 the said land was transmitted to the Administrator as personal representative of the said deceased pursuant to section 346 of the National Land Code 1965. On September 2, 1974 the Administrator by his Attorney executed an agreement to sell the land to Ng Lik Cheng alias Ng Yam Chee at the price of \$110,000.

In pursuance of the agreement of September 2, 1974 the Administrator by his Attorney took out an *ex parte* originating summons in the High Court at Seremban on November 11, 1974 for leave to transfer the land to the purchaser. The originating summons was supported by a short affidavit of the Attorney exhibiting thereto letters from the beneficiaries of the